Supreme Court, U.S.
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No. 05-319

In The
Supreme Court of the United States

PETER LONGANBACH, an individual,

Petitioner,

v.

DAVID GENZLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

With probable cause, the police arrest a suspect for murder. The police finish their investigation and write their reports. A prosecutor meets with an eyewitness to prepare her to testify at a pretrial hearing. During the meeting, questions are asked of the witness. The killer, convicted of aggravated manslaughter, sues the prosecutor under 28 U.S.C. § 1983 after serving his sentence. The killer claims that the prosecutor tampered with the witness's testimony during the pretrial meeting, causing him to be bound over and initially convicted of murder. The District Court denies the prosecutor summary judgment, refusing to recognize absolute prosecutorial immunity because the questions at the meeting made it investigatory and not advocatory. The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirms in a published opinion.

One question is presented:

1. During a pretrial meeting to prepare a witness to testify, does a prosecutor forfeit absolute immunity by asking the witness questions?

LIST OF PARTIES TO THE PROCEEDING

Peter J. Longanbach, Petitioner

David Genzler, Respondent

Jeffrey O'Brien

County of San Diego

San Diego County District Attorney's Office

Gregory Thompson

James Pippen

Paul Pfingst

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OPINIONS BELOW

The District Court's decision granting in part and denying in part Petitioner's motion for summary judgment (App., p. 27) is unreported. The initial opinion of the Ninth Circuit affirming that decision is reported at 384 F.3d 1092. After Petitioner petitioned for rehearing and *en banc* rehearing, the Ninth Circuit withdrew and replaced its initial opinion with the opinion reported at 410 F.3d 630 (App., p. 1), and denied the petitions for rehearing.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this action under 28 U.S.C. § 1331 because plaintiff and respondent David Genzler ("Genzler") based his complaint on 28 U.S.C. § 1983. The Ninth Circuit had jurisdiction because the District Court denied in part a claim of absolute prosecutorial immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

The Ninth Circuit entered its initial opinion affirming the District Court's opinion as to Petitioner on September 27, 2004. The Ninth Circuit withdrew and replaced its initial opinion on June 7, 2005, and denied Petitioner's request for rehearing and *en banc* rehearing that same day. (App., p. 1).

STATUTE INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On April 18, 1996, Genzler stabbed and killed Dustin "Dusty" Harless during a street fight outside a San Diego bar. Mr. Harless's girlfriend, Sky Blue Flanders, witnessed the killing. Genzler fled the scene but surrendered to the police the next day and was arrested. Genzler conceded that his arrest was based on probable cause. On April 23, 1996, a criminal complaint was filed charging Genzler with second degree murder while using a deadly weapon and assault with a deadly weapon. On April 24, 1996, the San Diego Police Department finished its investigation of

the murder, [illegible] submitted its written reports to the San Diego County District Attorney's Office.

Petitioner Peter J. Longanbach ("Longanbach"), a San Diego County Deputy District Attorney, was assigned to prosecute the criminal case against Genzler, including the preliminary hearing and jury trial. Genzler was convicted of second degree murder while using a deadly weapon and assault with a deadly weapon. Those convictions were overturned on appeal because the trial court erroneously disqualified Genzler's chosen attorney and failed to instruct the jury on a lesser included offense. A second jury convicted Genzler of involuntary manslaughter with use of a deadly weapon and assault with a deadly weapon.

Genzler's first conviction for murder now forms the basis of his present civil rights claims against Longanbach, the San Diego District Attorney's Office, former District Attorney Paul Pfingst, the County of San Diego, and other individuals involved in Genzler's initial prosecution. After twice being convicted of killing Harless, Genzler alleged Longanbach and Jeff O'Brien ("O'Brien"), a District Attorney Investigator, violated Genzler's civil rights by, among other things, causing Ms. Flanders to change her testimony during the prosecution.

While Longanbach denies every allegation of wrongdoing, he challenged Genzler's claims through a motion for summary judgment based in part on absolute prosecutorial immunity. The District Court granted Longanbach's summary judgment motion almost entirely, finding either that absolute prosecutorial immunity shielded Longanbach from the allegations, or alternatively, that there was no evidence to support those allegations. However, the District Court held Longanbach lacks absolute immunity

from the allegation that he met with Ms. Flanders in preparation for the preliminary hearing and told her that "in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past." It is only this ruling that Longanbach now challenges.

On September 27, 2004, a panel of the Ninth Circuit issued a decision affirming the District Court's ruling, holding there was evidence in the record "support[ing] the conclusion that Longanbach [was] engaged in an investigative function during the meeting," and therefore he is not entitled to the absolute immunity protection for "advocatory" conduct. Longanbach petitioned for a rehearing from both the panel and the Ninth Circuit *en banc*. On June 7, 2005, the Ninth Circuit panel withdrew and replaced its first opinion, and denied both petitions. The revised opinion reached the same conclusion as the September 27, 2004 decision.

SUMMARY OF ARGUMENT

This Court should grant review of the Ninth Circuit's decision for at least three reasons. First, the Ninth Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), which is based on very similar circumstances and almost identical allegations.

Second, the Ninth Circuit's decision is the first to deny prosecutorial immunity to a prosecutor for allegedly coaching an eyewitness to lie when the alleged lie was only used in court to support a criminal prosecution. Indeed, it is the first case to deny prosecutorial immunity to a

prosecutor for acts expressly found to be related to trial preparation. The Ninth Circuit's decision conflicts with prior decisions of this Court.

Third, the Ninth Circuit's decision will not only set an unworkable and likely unintended precedent, it will stifle the advocacy the public expects from prosecutors, essentially vitiating absolute immunity itself. As it stands now, any prosecutor who asks questions of a witness, even long after an arrest based on probable cause, is not entitled to absolute immunity from the allegation the prosecutor also improperly told that witness how to testify.

ARGUMENT

I. SUPREME COURT REVIEW IS REQUIRED TO SECURE INTER-CIRCUIT UNIFORMITY

The Ninth Circuit's decision directly conflicts with the Fifth Circuit's decision in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003). In *Cousin*, the plaintiff alleged that the prosecutor coerced and intimidated a witness to give false trial testimony and suppressed exculpatory evidence. After discussing Supreme Court precedent, and noting that the existence of probable cause "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards," (325 F.3d at 633, *citing Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n. 5 (1993)), the court stated that:

> In this case . . . the question of absolute immunity turns on whether [the plaintiff] had been identified as a suspect at the time [the witness] was interviewed and whether the interview related to testimony to be presented at trial.

325 F.3d at 633.

With that framework in mind, the *Cousin* Court held that coaching a witness to testify and allegedly to lie is advocatory:

> The record therefore demonstrates that, at the time of [deputy district attorney] Jordan's . . . conversations with [the witness] Rowell, in which Jordan allegedly told Rowell to implicate Cousin falsely in the murder and coached him how to testify, Jordan was acting as an advocate rather than as an investigator. The interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause. Jordan therefore is entitled to absolute immunity with respect to this claim.

Id. at 635.

As in *Cousin*, Longanbach met with Ms. Flanders *after* Genzler had been arrested based on probable cause, *after* the police had conducted their investigation and written their reports, and *after* Ms. Flanders had given statements to the police. Like *Cousin*, the witness meeting was designed "to secure evidence that would be used in the presentation of the state's case," not to identify an unknown suspect or establish probable cause to arrest. Genzler himself alleges that Longanbach met with Ms. Flanders and told her to lie in order to secure a conviction. That allegation in fact forms the primary basis for his claimed civil rights violation.

The Ninth Circuit's fuzzy analysis here conflicts directly with the bright line drawn in the Fifth Circuit. The Ninth Circuit failed to distinguish *Cousin*. The opinion attempted to set aside *Cousin* because on its record the

prosecutor met with the witness "to tell the witness how he should testify." App., p. 23; 410 F.3d at 643 (*citing Cousin*, 325 F.3d at 633). The Ninth Circuit concluded that the record here shows "a process of police-type investigation – or, viewed in the light most favorable to Genzler, a process of manufacturing evidence while performing police-type investigative work – not Longanbach or O'Brien acting as advocates by actively preparing Flanders for her testimony in court." App., p. 23, 410 F.3d at 643. This ruling violates Genzler's own complaint and remanufactures his case. The charge from which Longanbach sought immunity is that he "met with Ms. Flanders and told her that in order to secure a conviction, she needed to lie. . . ." App., pp. 64-65. No distinction can be made between "secure evidence that would be used in the presentation of the state's case" in *Cousin* and "secure a conviction" here.

II. SUPREME COURT REVIEW IS REQUIRED BASED ON THE EXCEPTIONAL IMPORTANCE OF THE NINTH CIRCUIT'S DECISION

A. The Ninth Circuit Erred as a Matter of Law – Coercing Testimony Is Clearly Advocatory Conduct

By applying qualified rather than absolute immunity to Genzler's allegations and the summary judgment record, the Ninth Circuit erred and trampled this Court's precedent. A prosecutor's actions "in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997) (*citing Buckley*, 509 U.S. at 273). "Prosecutorial immunity from § 1983 liability is broadly defined, covering 'virtually all acts,